

Office of Chief Counsel  
Internal Revenue Service  
**Memorandum**

**Number: 200645019**

**Release Date: 11/10/06**

CC:INTL:B02:KTHolman  
POSTU-115510-06

UILC: 6501.03-03

date: June 20, 2006

to: Jeff Johnson  
International Technical Advisor  
(Large & Mid-Size Business)

from: Phyllis E. Marcus  
Branch Chief, Branch 2  
Office of the Associate Chief Counsel (International)

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subject:

This Chief Counsel Advice responds to your request for assistance. This advice may not be used or cited as precedent.

LEGEND

Company A =  
Date B =  
Number C =  
D =  
Date E =  
Month F =  
Amount G =  
Amount H =  
Amount J =

ISSUES

1. Whether Company A's filing of the Form 1120 on Date B revokes the remaining extension of time to file that was granted until September 15, 2003?

2. Whether the filing of an original Form 1120 on Date B or the subsequent filing on September 15, 2003 of a second Form 1120, which is within the extended due date for the return and includes new information for the same taxable year, starts the three-year statute of limitations on assessment under section 6501?
3. Whether the penalty under section 6038(b) is applicable to the more than C Forms 5471 attached to the Form 1120 return filed on September 15, 2003 as late filed information returns because they were not attached to the original Form 1120 filed on Date B?

### CONCLUSIONS

1. No. The filing of the Form 1120 on Date B does not revoke the remaining extension of time to file that was granted until September 15, 2003. The Form 1120, filed on September 15, 2003, is considered to be a timely filed income tax return that supersedes the Form 1120 filed on Date B.
2. Company A's filing of the Form 1120 on September 15, 2003 is the return of the taxpayer and starts the statute of limitations on assessment.
3. The penalty under section 6038(b) is not applicable to the more than Number C Forms 5471 because Company A attached the Forms 5471 with its return that it filed on September 15, 2003, which is within the extended due date for the return.

### FACTS

The original due date of Company A's Form 1120 for the taxable year ended December 28, 2002 was Monday, March 17, 2003. On March 15, 2003, Company A signed and mailed Form 7004, Application for Automatic Extension of Time to File Corporation Income Tax Return, to the Ogden Campus and this application for extension automatically extended the due date of the Form 1120 until September 15, 2003.

On Date B, a date before September 15, 2003, Company A filed Form 1120 and Form 1139, Corporation Application for Tentative Refund. The Forms 1120 and 1139 showed an overpayment of tax and requested a refund of approximately \$D million. Additionally, the Form 1120 filed on Date B included only the basic income tax information and schedules and did not include any Forms 5471 with the return.

On September 15, 2003, Company A mailed to the Ogden campus a new Form 1120 for the taxable year ended December 28, 2002, which included different information than the original Form 1120 and requested an additional refund on an attached "Amended Form 1139." Further, the Form 1120 filed on September 15, 2003 included more than Number C Forms 5471. The Form 1120 filed on September 15, 2003 was not a Form 1120X, Amended U.S. Corporate Income Tax Return, which Company A has previously filed for prior tax periods. Subsequently, Company A mailed to the Ogden campus on Date E a letter stating:

On September 15, 2003, Company A filed their Final Form 1120 U.S. Corporation Income Tax Return for the 2002 tax year. The return superseded the initial filing for the same year that was made in Month F, 2003. In comparison with the initial filing, the final net operating loss increased by \$G, the capital loss decreased by \$H and the general business credit increased by \$J. As a result the attached amended Form 1139 is being filed to reflect these final numbers.

## LAW AND ANALYSIS

### 1. Filing of a Superseding Return Prior to Expiration of Extended Due Date

A tax return filed prior to the due date and changing the data reported on the original return is a type of return that is commonly referred to as a “superseding” return. See, e.g. IRM 3.5.61.1.3. A superseding return is generally treated as the taxpayer’s “return” and the corrections provided in the superseding return are in effect incorporated into, and treated as relating back to, and modifying or superseding the original return. See Haggar Co. v. Helvering, 308 U.S. 389, 395-96 (1940); see also Mamula v. Commissioner, rev’g 41 T.C. 572 (1964); Reaver v. Commissioner, 42 T.C. 72 (1964). This rule generally includes amendments filed within the time for filing original returns as extended. See A.J. Crowhurst & Sons, Inc. v. Commissioner, 109 F.2d 131 (3d Cir. 1940); Rev. Rul. 78-256, 1978-1 C.B. 438 (holding that an amended return filed before the due date (including extensions) constitutes the return for purposes of section 6655). On the other hand, an amended return that is filed late, after the due date (including extensions), is a nullity, and does not incorporate anything into the original return. See Badaracco v. Commissioner, 464 U.S. 386 (1984); WM. B. Scaife & Sons Co. v. Commissioner, 117 F.2d 572 (3d Cir. 1941). A taxpayer, therefore, is allowed to file a superseding return after it originally files its return but prior to the extended due date of the return. Thus, the filing of the Form 1120 on Date B by Company A does not revoke the remaining extension of time to file that was granted until September 15, 2003, and Company A properly filed a timely superseding income tax return on September 15, 2003 that supersedes the Form 1120 filed on Date B.

### 2. Return for Purposes of Starting Statute of Limitations

Section 6501(a) provides that, generally, tax must be assessed within 3 years after the return was filed, whether or not such return was filed on or after the date prescribed. Under section 6501(b)(1), a return filed before the last day prescribed for filing is deemed filed on the last day. A return filed on extension, however, is treated as filed on the day it is received, in the case of a return received on or before the extended due date, or on the postmark date, in the case of a return mailed before but received after the extended due date, See First Charter Financial Corp. v. United States, 669 F.2d 1342, 1346 (9th Cir. 1982). The statute of limitations on assessment under section

6501 begins only upon the filing of a valid return. See Beard v. Commissioner, 82 T.C. 766, 778-79 (1984), aff'd per curiam, 793 F.2d 139 (6th Cir. 1986).

Based on the same rationale discussed in section one above, an extension of time to file a return is taken into account in determining what return is "the return" for purposes of starting the statute of limitations. Consequently, we conclude that the valid return filed on September 15, 2003, the extended due date, is the return of the taxpayer and starts the statute of limitations on assessment under section 6501.

### 3 Applicability of Penalty under Section 6038(b)

Section 6038(a) requires that each U.S. taxpayer submit for each controlled business entity specified background information such as name, principle place of business and country incorporated, and nature of business. In addition, the taxpayer is required to furnish a balance sheet for each such CFC, information detailing transactions engaged in between the taxpayer and such entity, as well as stock ownership information. Such information is to be furnished on a Form 5471 filed for each CFC with the taxpayer's Form 1120 return. Treas. Reg. § 1.6038-2(f). Section 6038(b) prescribes a penalty of \$10,000 for each annual accounting period with respect to which such failure to submit such information exists and an increased penalty is provided where such failure continues for more than 90 days after the Service notifies the taxpayer of its compliance failure.

"An application for an extension of time for filing a return of income shall also be considered as an application for an extension of time for filing returns on Form 2952 or Form 5471." Treas. Reg. § 1.6038-2(i); see also Rev. Rul. 83-36, 1983-1 C.B. 358, and Rev. Rul. 86-58, 1986-1 C.B. 365 (finding that a timely superseding return is "the return" for purposes of a penalty under section 6654 or section 6655). Company A's return that it filed on September 15, 2003, therefore, is the return for purposes of the penalty under section 6038(b). Accordingly, the penalty under section 6038(b) is not applicable to the more than Number C Forms 5471 because Company A attached the Forms 5471 with its return.

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Please call (202) 622-3840 if you have any further questions.

By: \_\_\_\_\_  
Phyllis E. Marcus  
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(International)